IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~799~~ 4

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

WILLIAM R. JOHNSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT WILLIAM R. JOHNSON IN OPPOSITION.

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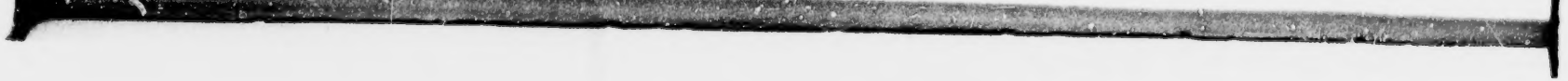

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Opinion Below.

The opinion of the Circuit Court of Appeals (Tr. 180-201)* is reported at 123 F. (2d) 111.

Question Presented.

The question presented by this case is whether the Circuit Court of Appeals correctly construed the order of February 28, 1940, of the District Judge which purported to

* The record is in four volumes. References to the small volume, which is the transcript of the District Court Clerk's record and of the record of the Circuit Court of Appeals and the pages of which are numbered from 1 to 232, are indicated by the abbreviation "Tr." References to the two large volumes, which are the bill of exceptions and the pages of which are numbered from 1 to 1066, are indicated by the abbreviation "R." References to the small volume which is Clifford's testimony by question and answer are made.—"Vol. IV."

authorize a Grand Jury to continue to sit during a third term of court.

Statement of the Case.

In December 1939 the second December 1939 Grand Jury of the Eastern Division of the Northern District of Illinois was impaneled. By order dated January 24, 1940, during the December term, this Grand Jury was authorized to sit during the February 1940 term of the court to finish investigations begun but not finished during the December term. During the February term, the Grand Jury requested the District Judge to continue it into the March 1940 term of the court to finish investigations begun but not finished by the Grand Jury during the December 1939 *and* the February 1940 terms of the court. Upon such request the District Judge entered the following order:

> "Now comes the Second December Term 1939 Grand Jury for the Northern District of Illinois, Eastern Division, by Dorothy W. Binder, Forewoman, and in open Court requests that an order be entered authorizing them, the said Second December, 1939 Grand Jury, heretofore authorized to sit during the February 1940 Term of this Court, to continue to sit during the Term of Court succeeding the said February Term of Court, to-wit, the March 1940 Term of Court, to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 Terms of this Court, and which said investigations cannot be finished during the said February 1940 Term of Court: and the Court being fully advised in the premises,
>
> "It Is Therefore Ordered That the Second December 1939 Grand Jury, now sitting in this Division and District, be, and it is hereby authorized to continue to sit during the March 1940 Term of Court for the purpose of finishing said investigations." (Tr. 28-29.)

It will be seen from the above that the Grand Jury requested the District Judge to authorize it to continue to sit in the March 1940 term not only to continue investigations

begun in the December 1939 term, but also to continue investigations begun in the February 1940 term of the court, and that the District Judge granted this request. In this respect the order of the District Judge was void because it violated the explicit provisions of Section 421, Title 28, U. S. C., Supp. which permits a continuation of a grand jury from one term of court into the succeeding term of court *solely* for the purpose of continuing investigations commenced but not finished in the term of the court in which the grand jury was originally impaneled. In this case the Grand Jury was originally impaneled in the December 1939 term of court and concededly could have been continued into the February 1940 term of court and then into the March term of the court solely to continue investigations begun in the December 1939 term of court, but not finished in the December and the February terms. What the Grand Jury requested and what the District Judge authorized was the continuation of investigations *begun* by the Grand Jury in the February 1940 term of court, as well as those begun in the December 1939 term. The order of the Judge being void, the Grand Jury legally impaneled in the December 1939 term and legally continued to the February 1940 term ceased to exist as a legal entity at the expiration of the February 1940 term and therefore had no legal existence on March 29, 1940, when it returned the indictment herein.

On March 29, 1940, the Grand Jury returned an indictment in five counts against Respondent and others (Tr. 2). The first four counts charged the Respondent Johnson with wilful attempts to defeat and evade a large part of his income taxes for the calendar years 1936 to 1939, inclusive, and charged the co-defendants with wilfully aiding and abetting Johnson's unlawful attempts at evasion. The fifth count charged all the defendants jointly with conspiracy to defraud the United States of Johnson's taxes for the years in controversy (Tr. 2-25).

Johnson filed a motion to quash the indictment, in which

it was charged in substance that the indictment had not been returned by a legal grand jury because the District Judge's order of February 28 purporting to continue the grand jury into the March term was void (Tr. 28-31). The District Court overruled the motion to quash (Tr. 45). Defendant Johnson also filed a demurrer to the indictment (Tr. 37-38), which was overruled (Tr. 45).

At the trial, the Government sought to sustain the allegations that Respondent Johnson failed to report all of his taxable income for the years 1936 through 1939 on two distinct theories:

(a) By undertaking to prove that Johnson was the sole owner of a group of gambling houses operated in and about Chicago and that all of the proceeds of checks cashed and currency exchanged by persons operating these gambling houses were income from these gambling houses, and therefore that the aggregate of these banking transactions was taxable income of this Respondent which was in excess of the amount of net income which he reported; and

(b) By offering proof that Johnson expended in said years more cash than he had available for spending according to the income reported.

Respondent Johnson denied that he owned any of said gambling houses and denied that he had any interest in the banking transactions, and offered evidence showing that the gambling houses were owned respectively by certain of those named in the indictment as accessories and conspirators, and that they only were interested in their respective banking transactions. He also offered evidence showing that expenditures made by him were within the amount of cash which he had available for spending according to his income tax returns.

Respondent Johnson filed income tax returns regularly from 1921 to the present time (R. 960). His returns for the years 1932 to 1939 inclusive were received in evidence

(R. 8-9). His income from gambling was generally reported on these returns as "Miscellaneous Speculative Income" (R. 437) or some similar description, and his business was often stated as "Speculator" (R. 103), or "Miscellaneous Investments and Speculations" (R. 438). These descriptions were suggested by public accountants employed by him to prepare his returns (R. 103, 437). Johnson reported for 1936 a net cash income of $173,220.40 (Gov. Ex. R-10); for 1937, $264,015.13 (Gov. Ex. 2-11); for 1938, $120,975.15 (Gov. Ex. R-12); and for 1939, $268,885.98 (Gov. Ex. R-13), and paid the tax due thereon.

In making the computation of Johnson's income for the several years the Government accountant included the aggregate amount of all financial transactions of all of the alleged accessories and conspirators at various banks and currency exchanges. It was assumed, without proof, that all money involved in these transactions represented net profits of gambling houses operated by some of Johnson's co-defendants. None of the proceeds of these transactions was deposited and there was no proof of the amount involved. The accountant's computations for each of the years were made on the assumption, without proof, that Johnson was the *sole* owner of all the gambling houses named by the Government witnesses and that all checks cashed and all currency exchanged by Sommers, Creighton, Flanagan, Kelly and Hartigan represented taxable income of Defendant Johnson. (R. 750-754). The Circuit Court of Appeals characterized this as "rank speculation" (Tr. 195).

All the direct evidence was to the effect that this defendant did not own, had no interest in and received no income from any of the gambling houses named in the indictment or in the bill of particulars or in the evidence, except such interest as he had in the Bon-Air gambling room through his ownership of stock in the Bon-Air Catering Company (R. 819, 861, 878, 896, 949). Supporting the testimony of

the co-defendants as to their ownership respectively of the gambling houses enumerated was the testimony of disinterested witnesses and exhibits offered by defendants (R. 782, 784, 785, 804, 805, 850, 851, 854, 856, 891). There was no direct evidence that Johnson owned or was interested in or received any income from any of these gambling houses. The circumstantial evidence offered by the prosecution to show that Johnson was the owner consisted of testimony that Johnson frequently visited some of the places, that he talked with the persons who were in charge, that the same accountants served Johnson and his co-defendants in the preparation of income tax returns, that large quantities of $100 bills were taken by the operators of the several gambling houses in cashing checks and exchanging currency, and that Johnson was in possession of $100 bills and used them with bills of other denominations in paying the purchase price of and for new construction on properties owned by him or in which he was interested, and other similar remote circumstances.

The Government also relied on circumstantial evidence to show the *amount* of Johnson's taxable income by the indirect method of proving cash expenditures made. For instance, the Government proved by the uncorroborated testimony of William Goldstein, a disreputable lawyer shown by admissions on cross-examination and by the testimony of credible witnesses and by documentary evidence to have committed perjury on the trial, that Johnson purchased Bon-Air Country Club in 1938 and paid the purchase price thereof (R. 57). Johnson testified that he owned only half of the property and that William R. Skidmore owned the other half (R. 956). Becker, a witness for the Government, testified that the purchase price was paid by Goldstein and that Goldstein stated that he was representing "clients" (note the plural) (R. 574). Many other witnesses testified to facts showing that Skidmore was interested in the Bon-Air Country Club (R. 893, 914, 915,

919, 922, 923, 925, 928, 954). There was no direct evidence by the Government that Johnson made *all* expenditures for the improvement of this property, but the Government accountant charged to Johnson every dollar that was spent on the property (R. 764). The only direct evidence on the subject is that Johnson made *half* of these expenditures and that the other half was made by Skidmore (R. 897, 956). The Government accountant admits that Johnson had available for expenditure in the years 1936 and 1937 more cash than he expended (R. 759). The Government arrives at its result of excess of expenditures over available cash in 1938 and in 1939 by assuming that all the money spent on the Bon-Air Country Club and on other properties in which he had some interest was spent by Johnson, but this assumption is the result of inference based upon inference.

There was a total failure of proof of the *amount* of Johnson's income for any year, except as shown by the returns filed by Johnson.

SUMMARY OF ARGUMENT.

I. The only question presented by the decision of the Circuit Court of Appeals is the validity of the February 28, 1940, order of the District Judge purporting to authorize the second December 1939 Grand Jury to continue to sit during the March 1940 term of the District Court. The Government is in error in asserting that the judgment of the court below is based upon a "variety of grounds." No ground other than the invalidity of the order of February 28, 1940, would support the judgment. The other questions discussed in the opinion of the court are not properly before this Court in this case.

II. The February 28, 1940, order of the District Judge being invalid, the December Grand Jury was not legally empowered to sit during the March term of the Court. Since the indictment against Respondent Johnson was returned on March 29, 1940, which was after the expiration of the February Term of Court, it was not returned by a legally constituted grand jury. The conviction based upon this void indictment was properly reversed.

III. The question of the validity of the February 28, 1940, order of the District Judge is not a proper basis for the granting of a writ of certiorari under the rules for issuance of such writ, there being involved no important constitutional question, question of statutory interpretation, or question of administration of any law.

IV. The judgment of the Circuit Court of Appeals does not result in a miscarriage of justice which calls for the exercise of this Court's supervisory powers. The record, far from showing Respondent guilty, shows that the prosecution of Respondent Johnson was a perversion of justice. The decision rests upon substantial and not upon technical grounds.

ARGUMENT.

I.

The Only Question Presented Is the Validity of the February 28, 1940, Order of the District Judge.

The only question presented for consideration of this Court by the decision of the Circuit Court of Appeals is whether the order of the District Judge of February 28, 1940, purporting to authorize the second December 1939 Grand Jury to continue to sit during the March 1940 term of the District Court was a valid order. The Court below rested its judgment solely upon the holding that the said order of February 28, 1940, was void.

The Petition states (pp. 2, 4) that the decision rests upon "a variety of grounds." It further states (p. 4) "It is not entirely clear from the lengthy opinion what part each ground played in the reversal, but as we read the opinion we believe its action was based upon the following considerations:". Thereafter in six numbered paragraphs the Government discusses what it apparently conceives to be the six different bases upon which the court below rested its decision.

A clear-eyed reading of the opinion of the Circuit Court of Appeals will show that the Government has improperly analyzed the opinion and has incorrectly stated the issues involved in this case, and demonstrates beyond any doubt that the invalidity of the order of the District Judge purporting to authorize the Grand Jury to sit during the third

term of Court was the only basis relied upon by the Circuit Court of Appeals to support its judgment.

Ground No. 1 (pp. 5-8 of the petition), and Ground No. 3 (p. 8), both turn upon this holding. Ground No. 1 is the Court's square holding that since the order of the District Judge purporting to authorize the Grand Jury to continue to sit during the March term was void, the Grand Jury had no legal existence and the indictment returned was a nullity. Ground No. 3 asserted in the petition as being a basis for the decision relates to language in the opinion (not specified as error by the Government in the petition) which indicates that the Circuit Court of Appeals is of the view that a record to sustain a conviction for an infamous crime must affirmatively show that the indictment upon which such conviction is had is a valid indictment returned by a legally constituted grand jury. As the Court said (Tr. 189), this question was discussed because "it is so closely related to our discussion concerning the continuance matter * * *." The Court pointed out that since the order of the District Judge purporting to authorize the Grand Jury to sit during the March 1940 term was void, the District Court could not hold the record to have been complete in this respect on the theory that it took judicial notice of orders impaneling and authorizing the continued sitting of the Grand Jury. The opinion went on to point out that under these circumstances an allegation in the indictment purporting to state the substance of the orders of the District Judge impaneling it and authorizing it to continue to sit into a third term was not sufficient to show that it had legal authority to act at the time that it returned the indictment. The Circuit Court of Appeals cannot be said to have gone further than to hold that in this case the record was insufficient because as it pointed out earlier in its opinion, the last

order of the District Judge authorizing the Grand Jury to continue to sit was void.*

A decision grounded upon any one of the remaining grounds asserted by the petition to have been relied upon by the Circuit Court of Appeals would have required an entirely different judgment by that Court. Ground No. 2 (p. 8), relates solely to the fourth count of the indictment and therefore cannot have been the basis for holding that the conviction on counts 1, 2, 3 or 5 should be set aside. Ground No. 4 (p. 9), of the decision has to do only with the indictment insofar as it relates to respondents in No. 800 and obviously cannot have been the ground for reversing the judgment so far as Respondent Johnson is concerned. Ground No. 5 (p. 9), obviously relates only to the first count of the indictment and therefore could not have been the basis for holding that the conviction of Johnson on counts 2, 3, 4 or 5 should be set aside. Ground No. 6 (p. 9), relating to the testimony of the expert witness Clifford which the Court below held invaded the province of the Jury, certainly cannot be suggested as having been con-

* Any concern that the Government may have over the statement of the court below that "Failure of proof with reference to the allegation under discussion is, in our opinion, fatal to the judgment", should be dissipated by the same court's opinion in the case of *William R. Skidmore* v. *United States*, decided October 31, 1941, and reported in 123 F. (2d) 604. This case decided after the *Johnson* case demonstrates clearly that the views expressed in the *Johnson* case on this point were based solely upon the holding of the court that the February 28 order of the District Judge was void. The indictment in the *Skidmore* case was returned by the same Grand Jury that returned the indictment in the *Johnson* case, but the *Skidmore* indictment was returned during the February term during which the Grand Jury had legal existence, whereas the *Johnson* indictment was returned during the March term after the legal existence of the Grand Jury had terminated. Under these circumstances the court below did not require the Government to offer further proof of the allegation in the *Skidmore* indictment concerning the authority of the Grand Jury to return it. Having held in the *Johnson* case the void order of February 28 continuing the Grand Jury to the March term to be proof that the Grand Jury did not have authority to return the indictment, the court properly held that the allegation of the indictment itself as to the existence of such authority was not sufficient proof thereof. We submit that the court was right in both cases and there is no inconsistency in the holdings; and even if the Government contests this interpretation, certainly the *Skidmore* case as a later expression of the court below has removed any necessity for this Court deciding the point in the way the Government contends in the petition that it should be decided.

sidered by the Court as a ground for its decision, since had this been the ground of decision the Court would have remanded the cause to the District Court for a new trial.

It will be seen from the above that clearly the sole basis on which the Circuit Court of Appeals rested its decision that the judgment of the District Court should be reversed and the proceedings against Respondent Johnson arising out of the indictment finally terminated, was its holding that the indictment not having been returned by a legally constituted and acting grand jury was void. It will be shown, *infra*, that this holding of the Court on this point is correct, and in any event the question is not one warranting the granting of the petition. This is obviously not the proper case for the decision of any questions other than whether the Court below was right or wrong in holding the order of the District Judge void.

If this Court should grant certiorari and should find that the Circuit Court of Appeals was wrong on this point, it would then perforce reverse the judgment of the Court and would have two courses open for the further disposition of this cause. This Court could either (1) remand the cause to the Circuit Court of Appeals for further proceedings in accordance with its opinion for the consideration and decision of the other errors urged by Respondent in that Court, including those points on which the Court below expressed views but did not rest its decision and points which were not discussed, or (2) it could itself undertake to consider and pass upon the some 200 separate assignments of errors which Respondent has noted (R. 1041-1064). It could not, as the Government infers in its petition, affirm the judgment of the District Court without having considered each of these numerous separate assignments of error and found them to have been without merit. It does not seem rash to assume that the first of these alternatives is the one that this Court would take.

What judgment the Circuit Court of Appeals would

enter after such a remand, and the grounds upon which it would rest such judgment, are purely speculative. None of the questions mentioned in the petition, which does not relate to the legal existence of the Grand Jury at the time the indictment was returned, will come squarely before this Court (in this case) unless this Court grants the instant petition, holds the court below to have been in error in having held the indictment invalid, and, after a remand to the court below for consideration of the questions arising out of the other errors assigned, finds the case again before it on a petition for certiorari. If these questions are important because they may rise to plague the Government in other cases, it certainly follows that a petition for certiorari in such of these other cases as may be necessary to set the questions at rest is the most appropriate way to elicit an expression of this Court's views upon them.

Since the order which the Circuit Court of Appeals must enter to effectuate its judgment will finally terminate all proceedings against Respondent Johnson, it is obvious that the ground for that Court's judgment must be one which goes to the invalidity of the entire proceedings in the District Court, and not one or several of which would require a remand for a new trial or other appropriate proceedings. The only error which the court below discussed in its opinion which requires a reversal of the judgment of the District Court and a dismissal of the proceedings against Respondent Johnson is the error found in the February 28, 1940, order of the District Judge. Had the Court below held the order of February 28, 1940, valid, and based a different judgment and remand on one or more of the other errors committed by the District Court, it would not have concluded its opinion with the simple statement: "In view of what we have said, it necessarily follows that the judgment must be reversed"; it would have set forth instructions as to what additional

steps were necessary to conform to a judgment based on the other errors.

The Government's attempt to persuade this Court that the judgment of the court below rests upon a "variety of grounds" evidences either an improper analysis of the opinion of the court below or an effort to compensate for the weakness of its case by raising false issues.

II.

The Indictment Was Not Returned by a Legally Constituted Grand Jury.

The Government does not contest the proposition that a grand jury in order to have legal power to act at a term subsequent to the term at which it is impaneled must have been authorized to continue to sit by an order of a district judge in conformity with section 421, title 28, U. S. C., Supp. Neither does the Government dispute the fact that section 421, title 28, U. S. C., Supp., empowers a district judge only to authorize a grand jury to continue to sit through a term subsequent to a term at which it was impaneled *solely* to finish an investigation commenced during the term at which it was impaneled. Section 421, title 28, U. S. C., Supp., is explicit in that respect and is clearly designed to preclude and prohibit a grand jury from commencing any investigation except during the term of court at which it is originally impaneled.

The question in the instant case which was presented to and decided by the court below was: Did the order of the District Judge purporting to authorize the December, 1939 Grand Jury to sit during the March, 1940 term conform to said section 421, title 28, U. S. C., Supp., or did it violate said section by purporting to authorize the grand jury to continue to sit to finish investigations begun in the February, 1940 term? The determination of this question turns

upon the construction which should be given to the language of the order of the Judge of the District Court. The question to be resolved does not in any way involve an interpretation of section 421, title 28, U. S. C., Supp., itself, since the plain meaning of that section is conceded by all parties.

If the Circuit Court of Appeals correctly construed the language of that order, the order was not in conformity with section 421, title 28, U. S. C., Supp., the life of the grand jury terminated with the February 1940 term, and any action taken or indictment returned after the expiration of the February 1940 term was not the action of a legally constituted grand jury. The February 28 order recites that the grand jury in open court requested that an order be entered authorizing the grand jury

> "heretofore authorized to sit during the February 1940 term of this Court, to continue to sit during the Term of Court succeeding the said February Term of Court, to-wit, the March 1940 Term of Court, to finish investigations begun but not finished by said Grand Jury during the said December 1939 *and the said February 1940* Terms of this Court, and which said investigations cannot be finished during said February 1940 Term of Court";

and then concludes,

> "It Is Therefore Ordered That the Second December 1939 Grand Jury, * * *, be, and it is hereby authorized to continue to sit during the March 1940 Term of Court for the purpose of finishing *said investigations.*" (Emphasis supplied.)

The court below held that the order of the District Judge in terms authorized the grand jury to continue to sit during the March, 1940 term to finish investigations commenced during the February, 1940 term as well as investigations commenced during the December, 1939 term. It is submitted that no one reading said order could construe it as having any other meaning. Even the Govern-

ment's petition does not suggest that, taken by itself, the order can be given any other meaning or that it has no meaning. Equally clearly such an order was not in conformity with, but was in violation of, section 421. The Government itself does not contend otherwise.

The petition instead rather naively suggests (p. 13) "* * * this order may perhaps have been inartistically drawn. * * *". Its lack of artistry evidently lies in its failure to conform to section 421, for certainly it is not an inartistic expression of the District Judge's intention to authorize the grand jury to finish in the March term investigations which it commenced in the February term. If this were its purpose it is certainly not open to attack on artistic grounds.

The Petitioner makes the amazing suggestion (p. 13) that the meaning of this order is not to be found by reading it but by referring to the January 24 order of the District Judge authorizing the grand jury to continue to sit during the February term to finish investigations begun during the December term, and by referring to an allegation in the indictment returned by the grand jury on March 29 which contains what purports to be the grand jury's interpretation of the effect of this order.

The petition ignores the basic canon of construction of any document, namely, that if the document is plain and intelligible on its face, its plain meaning is in law its true meaning. In any event, the two interpretation keys suggested by the Government are not available for that purpose even if it be assumed that the order of the District Judge is sufficiently ambiguous to admit of the use of other writings or statements for its proper interpretation. It should, perhaps, again be noted that the Government does not anywhere suggest that a plain reading of the order shows it to be in conformity with section 421, title 28, U. S. C., Supp. Obviously, such a suggestion cannot be advanced.

The argument based on reference to the January 24 order seems to be that since the grand jury could not under this order properly commence any investigations during the February term, the District Judge's order authorizing it to continue to sit during the March term cannot be construed as authorizing it to sit for the purpose of finishing an illegal investigation commenced during the February term. This argument boils down to the bald statement that since it would have been improper and in violation of the District Judge's order for the grand jury to have commenced an investigation during the February term, the District Judge could not have intended to authorize the grand jury to finish any such investigation, no matter what his order said. We concede that it would have been improper and illegal for the grand jury to have commenced any new investigation during the February term, but we submit that it does not follow therefrom that the District Judge did not intend, as his order provides, to authorize the grand jury to continue to sit to finish such investigations during the March term. This argument of the Government is not merely an assertion that if possible an order of a court or a judge should be construed in conformity with, rather than as being a violation of applicable law, but it is an assertion that a district judge is incapable of committing error and no matter what he says in his order, properly construed the order means what it legally could say and not what it actually does say.

The second document referred to in the petition as a proper guide for determining the true meaning and construction of the order of the District Judge is the indictment itself, particularly its allegation:

> "* * * having begun but not finished during said December Term of Court among other things an investigation of the matters charged in this indictment, and having continued to sit by order of this Court in and for said division and district during the February

> and March Terms of said Court for the purpose of finishing investigations begun but not finished during said December Term of Court, pursuant to request of the United States Attorney and upon motion of the Grand Jury, * * *"*

A comparison of this allegation with the recital in the order of the District Judge entered February 28, purporting to authorize the continuance of the December Grand Jury from the February to the March term, which reads,

> "Now comes the Second December Term 1939 Grand Jury * * * and in open Court requests that an order be entered authorizing them * * * to continue to sit during the * * * March 1940 Term of Court, to finish investigations begun but not finished by said Grand Jury during the said December 1939 and the said February 1940 Terms of this Court, and which said investigations cannot be finished during the said February 1940 Term of Court; * * *",**

shows that the grand jury requested something entirely different from what its recital in the indictment says was granted. There would seem to be no more a basis for arguing that the Court's order meant what the recital in the indictment says it meant, than that the recital in the indictment meant what the Court's order said that the grand jury requested. From the standpoint of proof or persuasive weight, a recital by a District Judge in an order entered at the time a request is made in open court by a grand jury as to what said grand jury requested would seem to be entitled to greater consideration than an allegation in an indictment returned over a month later by the grand jury as to what said order authorized. Certainly it is a proposition whose novelty does not outweigh its absurdity to suggest that an allegation made in an indictment by a grand jury a month after an order has

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* Note that there is no allegation that the investigation begun at the December term was not finished at the February term.

** Note that the grand jury was authorized to finish at the March term investigations begun at the February term as well as those begun at the December term.

been issued by a District Judge as to what the legal consequence, effect and meaning of said order is, is determinative of the real meaning of said order. Whatever weight might attach to a later statement of a District Judge as to the meaning of an order issued previously by him, certainly no persuasive value may be attributed to a statement of a grand jury as to what an order granted on its motion truly means.

We submit that the order is plain and unambiguous on its face, that no room exists for considering prior orders of the Court or subsequent statements of the grand jury as bearing upon its correct interpretation, and that in any event there is no legal basis for considering such documents as proper interpretative aids in construing the order. That the Government itself does not suggest seriously that this Court establish any such nonsensical precedent for interpreting the plain language of court orders is found in the very same paragraph of the petition (p. 13), in which the argument is advanced. Then in the same sentence the statement is made "The order was therefore valid," and the cleverly couched argument is added "and in any event, the indictment was in fact the product of investigations which were begun during the December term, so that even if the grand jury were given excessive authority it actually confined its activities within permissible limits." The Government is not even confident enough of the conclusion which it suggests follows from its novel method of interpretation to let it stand on its own feet as a sentence, much less the conclusion of a paragraph. The petition goes on in carefully chosen words to argue (p. 14), that granting the order to have been void, nevertheless the grand jury acted as it should have had it been continued by a valid order, and its actions were therefore valid. This argument only needs statement in unambiguous language to fall of its own weight, for obviously no matter how much like a legal and proper grand jury any group of 23 men may act, unless

they are in fact a legal grand jury, they cannot return a valid indictment. They have not the power of self-creation and their adherence to legal form cannot infuse them with legal life.*

The Government's argument (p. 14) that Section 556, Title 18, U. S. C., saves the indictment scarcely merits an answer. Our position is not that there is some defect or imperfection in the indictment. Our position is that there is no indictment. However perfect the pleading it is not an indictment unless it is returned by a legal grand jury.

Since the order of the District Judge of February 28, 1940, was void, the life of the grand jury terminated at the expiration of the February 1940 term (*In Re Mills*, 135 U. S. 263, 267; *Jones* v. *United States*, 162 Fed. 417, 421; *Nealon* v. *People*, 39 Ill. App. 481, 483), and since the indictment upon which Respondent was tried was returned on March 29, 1940, which was after the expiration of the February 1940 term, the indictment was not returned by a legal grand jury and the conviction based upon such indictment was therefore properly reversed. Fifth Amendment, United States Constitution.

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* The argument that, granting the grand jury was not validly authorized to continue to sit during a third term of court, it nevertheless could return a valid indictment if it did what a grand jury legally authorized to sit should have done, cannot be given any consideration whatsoever. Its use in this case, however, is even more objectionable, since the record clearly shows that the grand jury in returning the indictment upon which these proceedings were taken acted improperly even if it be conceded that it had a valid and legal existence at the time the indictment was returned, as reference to the opinion of the Court of Appeals will show with respect to the fourth count of the indictment. With respect to other counts of the indictment, the record is bare of evidence because although respondents sought to put the matter in issue by a motion to quash and plea in abatement, the Government refused to answer the motion and respondents were not permitted to introduce evidence on the point (Tr. 45).

III.

The Question Presented in This Case Is Not a Proper Basis for a Grant of a Writ of Certiorari.

The question of whether a circuit court of appeals has correctly or incorrectly construed the language of an order of a district court, there being involved no important constitutional question, question of statutory interpretation, or question of the administration of any law, does not present a proper case for the issuance of a writ of certiorari.

The Government in its petition (p. 15), states "the alleged invalidity of the indictment was the principal ground of reversal * * *." And on the same page states "* * * the decision below, to the extent that it merely turns upon the interpretation of the February 28 order (the basis for holding the indictment invalid) may not have any immediate impact upon other cases * * *."

The Government certainly could not contend otherwise, for obviously the holding of the Circuit Court of Appeals that the particular order of the District Judge in this case was not in conformity with Section 421 could have no effect upon other orders drawn in conformity with that section. The opinion in fact points out the proper way in which to conform to Section 421, and if anything, should be helpful to the Government in the prosecution of other criminal cases.

The Government does not contend that the question of whether the order of the District Judge purporting to authorize the Grand Jury to continue to sit during the March term is void or not raises any question of statutory interpretation. There is no question raised as to the meaning of Section 421, Title 28, U. S. C., Supp. It is in effect conceded by the Government that if the February 28 order

of the District Judge meant what the Circuit Court of Appeals held that it meant, it is not in conformity with the said section. Nor is there any question raised that the Fifth Amendment to the Constitution requires that a conviction for an infamous crime be based upon indictment returned by a grand jury.

This Court has consistently interpreted Section 240 of the Judicial Code (U. S. C., Title 28, Sec. 347) as not requiring this Court to consider as being determinative of whether a writ of certiorari should issue, the question of whether a court to which such a writ may issue has ruled erroneously. It is the implications, consequences and the nature of the error involved rather than the question of whether error has been committed that is decisive of whether the writ should issue. No case has been found by Respondent which would support the proposition that, where the only error of a circuit court of appeals consists of its failure rightly to read the language of an order of a district judge, and there are no important consequences of a precedential character, and no important questions of constitutional, statutory or administrative interpretations are involved, a proper case for the issuance of a writ of certiorari is presented. This is true even where the Circuit Court of Appeals is manifestly wrong in reading the language of the order of the District Court. It is certainly not open to question, where as here, one must torture plain language out of its plain meaning even to argue that the order is ambiguous enough to admit of any interpretation other than the one placed upon it by the Circuit Court of Appeals.

IV.

The Decision of the Circuit Court of Appeals Does Not Result in a Miscarriage of Justice and Does Not Call for the Exercise of This Court's Supervisory Powers.

The contention of the Petitioner (p. 12) that this case involves "such a miscarriage of justice as to call for the exercise of this Court's supervisory powers" is not supported by (a) the record, or (b) the allegations of the petition. We submit that this question is not properly before the Court on this petition but since it is presented by the Petitioner we answer it.

A.

The Record Fails to Show Johnson Is Guilty as Charged.

The language of Judge Hutcheson in *Symonette* v. *United States*, 47 Fed. (2d) 686, 687, so aptly describes the case at bar that we adopt it:

> "This is one of those cases, of which the books contain too many instances, of an effort by the government, on a conspiracy indictment, to supply the place of testimony by piling inference upon inference; of an effort to make deduction take the place of proof; and to have the jury, by reasoning backward from non-criminal acts, build up by inference a state of facts to make them criminal, which, if they in fact exist, the evidence ought to have established."

There is no direct proof that Defendant Johnson has failed to return taxable income for any year. The direct proof is that he has returned all taxable income for the past twenty years, and particularly for the years 1936, 1937, 1938 and 1939, covered by the indictment, and that he has paid all income taxes due the Federal Government.

The prosecution sought to prove by circumstantial evi-

dence its charge of wilful attempt to evade under the first four counts and of conspiracy to defraud by evading under the fifth count by two approaches. We confidently believe that this record presents a case where there is a total failure of proof on either theory, but if we are in error in this, at least the record is one that is so close on the facts that it should be free from substantial errors.

Johnson could not be guilty of attempting to evade a tax unless some tax was due. (*Gleckman* v. *United States*, 80 Fed. (2nd) 394, 399.) Johnson was not required to prove that he had paid all taxes due from him. The burden of proof in a criminal case never shifts to the defendant. (*McKnight* v. *United States*, 115 Fed. 972, 974; *Chaffee* v. *United States*, 18 Wall. 516, 545.) It is also settled law that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused. (*Nicola* v. *United States*, 72 Fed. (2nd) 780, 786; *McClintock* v. *United States*, 60 Fed. (2nd) 839, 842) and that where the evidence for the prosecution is as consistent with innocence as with guilt, a judgment of conviction will not be sustained by a reviewing court. (*Velasquerra* v. *United States*, 21 Fed. (2nd) 508, 510; *Bishop* v. *United States*, 16 Fed. (2nd) 410, 417.) The law requires that there be more than some evidence of guilt. (*Touhey* v. *United States*, 93 Fed. (2nd) 861, 866.) The proof must be of that substantial character which leaves an abiding conviction that the accused is guilty of the offense charged.

The circumstantial evidence in this case must be weighed in the light of the fact that Johnson has filed income tax returns regularly for twenty years (R. 960) and his returns have been regularly audited and that no fraud penalty was ever assessed against him until this indictment was returned (R. 7-8) and also in the light of Johnson's good reputation for truth, honesty and fair dealing (R.

916-920). The Government wholly fails to prove by competent evidence that Johnson had any taxable income which he did not return for any year.

B.

The Petition Does Not Show There Has Been a Miscarriage of Justice.

it will be seen, therefore, that the record does not support the assertion of the Government that a "miscarriage of justice" has occurred. By that phrase the Government apparently means that one who is guilty in fact of the commission of a crime as charged is not being punished therefor. In other words, abstract justice is not being vindicated, although legal justice may be being administered. In this case, of course, if the indictment is a nullity because the body which returned it was not a legally constituted Grand Jury, justice under our laws is not being had if the respondent is made to serve a sentence, although if he is really guilty of having evaded his income tax as charged, abstract justice might be served by his being fined and jailed notwithstanding that his constitutional rights are violated in the process.

It seems singularly inappropriate for the Government to urge this contention in this proceeding, for if their position is sound, Johnson may be made (without regard to whether he may be reindicted and retried and convicted) to answer in a civil proceeding not only for the allegedly large amounts of unpaid taxes, plus interest, but for an enormous tax penalty. We recognize, of course, that in legal theory a 50 percent tax penalty assessment is not to be considered on the same footing as a fine imposed in a criminal trial. We do submit, however, that it is as serious a financial punishment to pay money denominated as a tax penalty to the Government as it is to pay money denominated as criminal fine to the Government. In fact,

in the same lay sense in which the word "justice" is used in the phrase of the petition "a miscarriage of justice", a 50 percent additional tax assessment may be called a punishment inflicted upon the Defendant, so that abstract justice may be vindicated (if it is defeated, which we vigorously deny, by the setting aside of the convictions herein) by the imposition and collection of a staggering assessment in a civil proceeding, a matter which if the Government is correct in its conclusion, should be comparatively easy.

The petition alleges (p. 12) that a reversal of the trial court "based primarily upon technical grounds is, we believe, such a miscarriage of justice as to call for the exercise of this Court's supervisory powers."

Presumably if the reversal were based upon *substantial* rather than upon "technical" grounds, the Government would not contend that this Court solely in the exercise of its supervisory powers should step in to prevent what the Government is pleased to call "a miscarriage of justice."

The reversal is based primarily on the ground that only a legally constituted Grand Jury can return an indictment upon which under our Constitution a conviction for an infamous crime may be sustained. A conviction obtained without such an indictment is not merely technically defective but is void because a basic constitutional right of the accused has been violated.

Not only is the reversal of the judgment by the Circuit Court of Appeals not a miscarriage of justice, but the prosecution of the respondent Johnson has been a perversion of the administration of justice. The respondent Johnson gambles. He has never contended to the contrary. But the Government went to such lengths to show that he was a gambler, in its attempt to prejudice the jury, that the Circuit Court of Appeals was moved to remark:

"The offense charged was evasion of income tax—

not gambling or operating gambling houses. A person reading the record, without knowledge of the charge, could reasonably conclude that the defendants were tried on the latter offense." (123 Fed. (2nd) 126.)

It is difficult to believe that a United States Attorney would waste the time of a court and of a jury by presenting testimony entirely extraneous to the issue of income tax evasion, however pertinent it might be in a trial for violation of state gambling statutes, unless he felt that without such evidence a conviction could not be obtained. Whether a righteous indignation against one who is engaged in an activity that might violate state gambling laws or a desire for the publicity in store for one who could convict a gambler for anything from overtime parking to income tax evasion motivated this type of trial tactics is unimportant. It goes without question that they are out of harmony with the tradition and spirit of our jurisprudence and form of government which guarantees equality before the law to low-born as well as high, and proudly takes the onus of refusing to permit persecution of the least worthy with the same assurance of essential rightness that it vigorously protects the most worthy.

It is not the virtue or vice of a man's character, but what he has done that he must answer for when charged with crime in the courts of our land. To maintain that principle today, our property and our lives alike are dedicated against a threat by those whose basic philosophy may be summed up as saying what a man is counts and what he does is unimportant,—if he is of the right race, or creed, or profession, he should be exalted; if he is of the wrong race, or creed, or profession, any oppression is justified.

It is hard to read the record and not believe that however willing Johnson may have been to violate the statutes of the State of Illinois dealing with gambling, he had no desire or intention to bring down upon his head the wrath of the Bureau of Internal Revenue. Parenthetically, it may

be said that it is anomalous indeed to assume that Johnson, a professional gambler, would play a game with the Bureau of Internal Revenue in which he would pay large sums to the Bureau without minimizing his risks or losses, but on the contrary increasing them, for by the very fact of filing returns and reporting large income he invited close scrutiny.

It is surprising, indeed, that the conjunction which is not only a nonsequitur in logic but is repugnant to our system of laws, between Johnson's profession and his guilt or innocence of the charge of income tax evasion, should appear not only in the trial of this case in the District Court, but should also appear in the petition for certiorari. There it appears not merely as a pardonable inclusion of the statement of the case, but in rhetorical splendor in the very first line of the section headed "Reasons for Granting the Writ" (p. 11). That section starts "The respondent Johnson, a professional gambler of 'towering stature among that fraternity,' was convicted together with five co-defendants of evasion of large amounts of income taxes after a long jury trial." How the Petitioner determined that Johnson was convicted of evasion of "large" amounts of income taxes, it does not deem it necessary to inform the Court or the Respondent. We freely concede that the Government attempted to prove Johnson was guilty of evasion of large amounts, but how large the amount of the evasion was found by the jury to be we do not know, nor does the record disclose. Nor, incidentally, do we know why the Government deemed it important to characterize the trial of the Respondent as being a "long jury trial". Its length was certainly attributable more to the Government's excursions into interesting but nonetheless irrelevant fields of the operation of professional gambling houses and to the roundabout and speculative nature of the Government's case which consisted of massing unimportant and trivial testimony to take the place of persuasive direct evidence.

This Respondent Did Not Have a Fair Trial.

Frank J. Clifford, a Government agent who qualified as an accountant, made a summary of the evidence for the Government and testified to the conclusions that Defendant Johnson had net taxable income for the years 1936, 1937, 1938 and 1939 in excess of that which he reported (Vol. IV). It will appear from an examination of the testimony of this witness that he *weighed* all of the evidence in the record, that he *determined* the credibility of the witnesses, that he *accepted* the evidence which supported the theory of the prosecution, that he *rejected* the evidence brought out on cross-examination of Government witnesses and the statements of defendants offered by the Government which supported the theory of the defense, that he *concluded* from an examination of *all* the evidence that Defendant Johnson was guilty and *expressed* his conclusion to the jury. To permit this witness to thus invade the province of the jury and to determine the very questions at issue is in direct conflict with the holdings in *United States* v. *Spaulding*, 293 U. S. 498, 506; *Dexter* v. *Hall*, 82 U. S. 9, 26; *United States* v. *Cole*, 82 Fed. (2nd) 655, 657; *Wilkes* v. *United States*, 80 Fed. (2nd) 285, 291; and *United States* v. *Stephens*, 73 Fed. (2nd) 695, 704.

Clifford was asked to consider all of the evidence in the record and to state the net cash income reported by Johnson for the years 1932 to 1939 inclusive. Then he was asked to state the total amount of expenditures by Johnson for the same eight-year period. He stated that the income reported was $1,188,041.83 and then volunteered that the total cash Johnson had available for the eight-year period was $1,256,041.85. He stated that Johnson's total expenditures were $1,730,391.39 (Vol. IV, p. 14). In computing expenditures Clifford assumed Johnson made all expenditures on the property at 9730 South Western Avenue and ignored testimony of Government witnesses that Skid-

more owned half of the property and paid for the improvement of it (Vol. IV, p. 20). Clifford also assumed that Johnson was the sole owner of Bon-Air Country Club, relying on the uncorroborated but impeached testimony of Goldstein (Vol. IV, pp. 21-22), and he included all expenditures made in connection with the acquiring and improving of Bon-Air Country Club (Vol. IV, p. 49) without any direct proof that Johnson had made all of these expenditures but inferring that he had because he held title to the property.

Getting down to years, Clifford was asked to consider all the evidence in the record and to compute the total amount of income of Johnson for 1936, and over objection he answered $547,942.38 (Vol. IV, p. 15). He was then asked to state from the evidence in the record the amount of Johnson's income for 1937. Similar questions were asked as to 1938 and 1939 (Vol. IV, pp. 16-18). In computing Johnson's income for 1936 Clifford included all the $100 bills that came from the Lawndale Currency Exchange, all of the currency deposited by the Albany Park Currency Exchange with the Milwaukee Avenue National Bank, all the currency exchanged and checks cashed by gambling house operators at The Northern Trust Company, all checks cashed at the Albany Park Exchange and marked on its records J. S., M. D., 1, 2, 3, H. S., D. D., or K. L., which he assumed were gamblers' checks, and all checks cashed and currency exchanged by Creighton at Mid-City National Bank (Vol. IV., pp. 27-28), *without a syllable of proof that Johnson had any interest in these transactions, or that he ever received one cent of the proceeds thereof.* Johnson's income for 1937, 1938 and 1939 was computed by Clifford on the same unsupported assumptions that every financial transaction of the eight co-defendants were transactions of Defendant Johnson and that the aggregate of these transactions represented taxable income of Defendant Johnson (Vol. IV, pp. 29-34).

Clifford's conclusion that Johnson had a greater income than $173,220.40 reported in 1936, than $264,015.13 reported in 1937, than $120,975.15 reported in 1938 and than $268,885.98 reported in 1939, is pure conjecture. His conclusions are presumptions based on presumptions.

By overruling Defendant's objections (R. 741-743) and Defendant's motion to strike (R. 762) the Court in effect told the jury that Clifford was right in rejecting the evidence that did not suit the purpose of the prosecution, in accepting at face value all of the evidence which was against the defendants, and in concluding that all financial transactions of co-defendants were Johnson's transactions and that the aggregate of these transactions represented taxable income of Johnson. The rulings of the Court amounted to an instruction to the jury that Clifford's deductions were sound and that Johnson had an income for each of the four years grossly in excess of the income reported by him and left the jury no choice except to return a verdict of guilty. *By its action the Court substituted a trial by a Government agent for a trial by jury.**

The assignments of error detail scores of erroneous rulings in the admission of evidence (R. 1043-1054) but we shall not discuss them. We think the assignments speak for themselves. Most damaging of the evidence received against Defendant Johnson was that of numerous banking and currency exchange transactions by co-defendants, without any evidence connecting Johnson with such transactions (Assignments 16(y)-16(cc)). This hearsay evi-

* The testimony of the same Clifford held by the court below in the *Skidmore* case, 123 Fed. (2d) 604, to have been proper was in marked contrast to his testimony in this case. The differences which are clear from a reading of the two opinions demonstrate not merely the difference between proper and improper testimony of an expert witness but show that the views expressed on Clifford's testimony in this case by the court below are not either "arbitrary" nor so restrictive as to embarrass or hamper the Government in the employment of expert testimony. We submit that the court was right in both cases and there is no inconsistency in the holdings; and even if the Government contests this interpretation, certainly the *Skidmore* case as a later expression of the court below has removed any necessity for this Court deciding the point in the way the Government contends in the petition that it should be decided.

dence is the sole basis of the *amount* of Johnson's income for the years 1936 and 1937 and the basis for the *amount* of a major portion of his income for 1938 and 1939. The evidence of the transactions in the Reserve for Uncollected Funds account on the books of the Lawrence Avenue Currency Exchange was rank hearsay, (Assignments 16(w), 29(i), 38), but this evidence, plus the evidence of the banking transactions, constitute the only basis for the *amount* of income for 1938 and 1939. The admission of the hearsay testimony of agent Lawrason who summarized a lot of checks found at Mid-City National Bank by an examination through a projector of illegible Recordak films was grave error (Assignments 50-51). There was also dumped into the hopper five Nationwide News Service books, each containing more than one thousand separate customers' accounts, but not a single one of these accounts was identified with Defendant Johnson (Assignment 30). The individual income tax returns of the various co-defendants were hearsay as to Defendant Johnson and were prejudicial to him (Assignments 17-22). Score of witnesses were permitted to recite the details of the operations of gambling houses by the several co-defendants and to relate conversations and describe transactions that took place outside the presence of Defendant Johnson, and certain gamblers were permitted to relate in detail their experiences at various gambling houses and to recount their losses (Assignment 31). It cannot be said that the admission of this improper evidence was not prejudicial. It has been held that a conviction in a criminal case should not be affirmed unless it is made to appear beyond doubt that the improper evidence admitted did not prejudice the rights of the accused. *Sprinkle* v. *United States*, 150 Fed. 56, 59; *McCandless* v. *United States*, 298 U. S. 342, 347; *Little* v. *United States*, 73 Fed. (2nd) 861, 866.

The cross-examination of Johnson was highly improper and prejudicial (R. 966-968, 976, 980). Wait was cross-examined at length with respect to Johnson's connection

with dog tracks in 1927 and there was the implication that there was something wrong about the arrangements made and the persons with whom Johnson dealt (R. 903). When the prosecutor cross-examines to degrade the Defendant and prejudice him with the jury, he cannot be heard to say that the cross-examination did not do what he intended it should do. (*Salerno* v. *United States*, 61 Fed. (2nd) 419, 424; *Coulston* v. *United States*, 51 Fed. (2nd) 178, 182; *Miller* v. *Territory*, 149 Fed. 330, 339.) Obviously, improper matter brought to the attention of the jury by remarks of the prosecuting attorney, or by the questions of the cross-examiner, is no less prejudicial than evidence erroneously admitted over objections. *Toubin* v. *United States*, 93 Fed. (2nd) 861, 868; *Skuy* v. *United States*, 261 Fed. 316, 319; *Berger* v. *United States*, 295 U. S. 78, 84.

Where a defendant requests the Court to instruct on matters that are material to the issues and these instructions are refused and the jury is left without guidance on these matters a judgment of conviction should be reversed. (*Gold* v. *United States*, 102 Fed. (2nd) 350, 352; *Nanfito* v. *United States*, 20 Fed. (2nd) 376, 379; *Feder* v. *United States*, 257 Fed. 694, 696; *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543, 556.) Requested instructions 38, 39 (R. 1028), 57 (R. 1031), 59 to 72, inclusive (R. 1031-1032), 73, 75 (R. 1032) and other requested instructions, not necessary to mention here, were erroneously refused. With these instructions omitted, the charge gave undue emphasis to statutory requirements with regard to the making of income tax returns (R. 1014-1015) and fixed in the minds of the jury that irregularities in the form of returns made by Defendant Johnson, and for many years accepted by the Collector, were evidence in support of the charges against him.

Sending to the jury a mass of documents lays undue emphasis on a part of the evidence, and the Court should permit the jury to have only such exhibits as it finds nec-

essary to a proper consideration of the case. (*Buckley* v. *United States*, 33 Fed. (2nd) 713, 717; *People* v. *Clark*, 301 Ill. 428, 432.) It is error to permit exhibits to go to the jury which contain prejudicial matter, even though parts of the exhibits are material and properly in evidence. (*United States* v. *Dressler*, 112 Fed. (2nd) 972, 978.) The presumption is that the presence in the jury room of improper exhibits is injurious to the defendant. (*Ogden* v. *United States*, 112 Fed. 523, 527.) It is impossible to tell what damaging effect upon the minds of the jury resulted from the truckload of exhibits that was hauled into the jury room. Every document which was received in evidence was delivered to the jury over the objection of defendants (R. 1023-1024). The jurors had much of the Government's evidence before them in writing but were left to remember the defendants' explanation of the various exhibits or their testimony with respect to them. It was reversible error thus to invade the jury room with this great mass of exhibits, many of them containing rank hearsay and grossly prejudicial matter.

This respondent should not be deprived of his liberty until he is charged by an indictment returned by a legal grand jury and convicted upon a trial conducted according to law.

Conclusion.

The decision of the Circuit Court of Appeals is correct and involves no error of law, and in any event presents no question justifying issuance of a writ of certiorari either in the exercise of this Court's supervisory powers or under any of the rules laid down to govern the granting of such writs. The petition for writ of certiorari should be denied.

Respectfully submitted,

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